IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

LONG, ET. AL	:	MAY TERM, 2017
v.	:	NO. 00784
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	CLASS ACTION

OPINION

Appellants, Frank Long, Joseph Shipley, Michael White, et. al, appeal this court's Order docketed August 28, 2017 sustaining preliminary objections and dismissing their Class Action Complaint.

Appellants commenced this action by way of Complaint filed on May 30, 2017, bringing claims for violations of Pennsylvania's Criminal History Records Information Act, 18 Pa.C.S.A. §9125 ("CHRIA"). Appellants alleged that Defendant/Appellee improperly denied them jobs on the basis of various prior drug-related offenses which Appellants claim were unrelated to their suitability for the positions sought. Appellants requested that Appellee be enjoined from committing further violations of the CHRIA, and requested actual and punitive damages, as well as attorneys' fees and costs.

Procedural History

Prior to filing their Complaint in this court, Appellants had filed a Complaint in the District Court for the Eastern District of Pennsylvania. *See* Exhibit "B" to Appellee's Preliminary Objections. Appellants' federal court Complaint contained claims for violations of the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* ("FCRA") and the CHRIA. Appellants' CHRIA claim filed in this court is identical to the CHRIA claim contained in their federal court Complaint, and Appellants request the same relief in each case. On April 5, 2017, the District Court for the Eastern District of Pennsylvania issued a Memorandum Opinion in which Appellants' FCRA claim was dismissed for lack of standing. *See* Exhibit "D" to Appellee's Preliminary Objections. In that same Opinion, the District Court declined to exercise jurisdiction over Appellants' CHRIA claim pursuant to 28 U.S.C. §1367(c)(3). *Id.* Appellants appealed the District Court's dismissal of their FCRA claim to the Third Circuit Court of Appeals, where their federal case is still pending.

The docket reveals that the case commenced in this court May 30, 2017, with the filing of a Class Action Complaint against Appellee, Southeastern Pennsylvania Transportation Authority, (SEPTA). *See* Complaint –Class Action, *generally*. (Complaint). The Complaint averred violations of Pennsylvania's Criminal History Records Information Act, 18 Pa.C.S.A. §9125 ("CHRIA"). Appellants alleged that Appellee improperly denied them jobs on the basis of criminal conviction histories for various drug-related offenses. Appellants claim such convictions were unrelated to their suitability for the positions sought. Appellants requested that Appellee be enjoined from committing further violations of the CHRIA, and requested actual and punitive damages, as well as attorneys' fees and costs.

On June 15, 2017, Appellee filed Preliminary Objections to Appellants' Complaint in the instant action. In their Preliminary Objections, Appellee argued that Appellants' Complaint should be dismissed, asserting grounds of: (1) *lis pendens*; (2) sovereign immunity; (3) failure to plead a cause of action (*i.e.* Demurrer); (4) insufficient specificity in a pleading; and (5) failure to comply with a rule of court. Appellee also argued that Appellants should be precluded from seeking punitive and exemplary damages against Appellee as an agency of the commonwealth, and that certain portions of the Complaint containing scandalous and impertinent matters should be stricken.

On July 5, 2017, Appellants filed an Answer in Opposition to Appellee's Preliminary Objections, requesting that the Court overrule Appellee's objections as being without merit.

On July 24, 2017, Appellee filed a Reply in Support of their Preliminary Objections.

On August 28, 2017 this court sustained the Preliminary Objections and dismissed the Complaint.

On August 31, 2017 Appellants filed a timely Notice of Appeal to the Commonwealth Court of Pennsylvania.

On September 7, 2017, this court issued an Order pursuant to Pa.R.A.P. 1925(b), directing Appellants to file a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days.

On September 22, 2017, Appellants filed a lengthy Concise Statement of Matters Complained of on Appeal, arguing, generally, that this court sustained preliminary objections supporting a dismissal of Appellant's Complaint with no written opinion therefore making its reasons for dismissal not readily discernable; and, this court erred in sustaining each preliminary objection and dismissing all of appellants' claims.

Discussion

A trial Court's decision regarding preliminary objections will be reversed only where there has been an error of law or an abuse of discretion. *See Cooper v. Frankford Health Care System, Inc.*, 960 A.2d 134, 144 (Pa. Super. 2008). An abuse of discretion is not merely an error of judgment. *See Werner v. Plater-Zyberk*, 799 A.2d 776, 783 (Pa. Super. 2002). Rather, the trial court commits an "abuse of discretion" when its judgment is manifestly unreasonable, or when the law is not applied, or if the record shows that the decision resulted from partiality, prejudice, bias or ill will. *Id.* An inquiry into an abuse of discretion is operationally equivalent to an inquiry into the merit of the trial court's decision. *See id* at 783 (stating that an abuse of discretion would be found where a trial court's reason for performing a discretionary act had no merit). When sustaining a trial court's ruling will result in the denial of a claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt. *Id.* "To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred." *Id.* Any doubts should be resolved by a refusal to sustain the objections. *Id.*

Even where a trial court has sustained preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without granting leave to amend. *Harley Davidson Motor Co., Inc. v. Hartman*, 442 A.2d 284, 286 (Pa. Super. 1982). There may be some cases where amendment is impossible, and extending leave to amend would be futile. *Id.* However, the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully. *Id.* "[I]f it is evident that the pleading can be cured by amendment, a court may not enter final judgment, but must give the pleader an

opportunity to file an amended complaint ... This is not a matter of discretion with the court but rather a positive duty." *Framlau Corp. v. Cty. of Delaware*, 299 A.2d 335, 337 (Pa. Super. 1972).

Here, Appellee raised preliminary objections in the nature of a motion to dismiss on four distinct grounds: (1) pendency of a prior action or agreement (*i.e. lis pendens*); (2) legal insufficiency of a pleading (*i.e.* demurrer) due to the doctrine of sovereign immunity and/or inadequate factual averments in the Complaint; (3) insufficient specificity in a pleading; and (4) failure of a pleading to conform to law or rule of court. Additionally, Appellee raised preliminary objections in the nature of a motion to strike on the grounds that: (1) Appellants' request for exemplary or punitive damages was invalid as a matter of law; and (2) that the Complaint included scandalous or impertinent matter.

A. Lis Pendens

A party may file preliminary objections to a pleading on the grounds that a prior action is pending (*i.e. lis pendens*). Pa.R.C.P. 1028(a)(6). The doctrine of *lis pendens* is designed to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. *Penox Technologies, Inc. v. Foster Medical Corp.*, 546 A.2d 114, 115 (Pa. Super. 1988). In order for the doctrine of *lis pendens* to apply, the party asserting the doctrine must satisfy a three-pronged identity test by alleging and proving that: (1) the cases are the same; (2) the parties are the same; and (3) the relief sought is the same. *Hessenbruch v. Markle*, 45 A. 669, 671 (Pa. 1900); *See also Virginia. Mansions Condominium Association v. Lampl*, 552 A.2d 275, 277 (Pa. Super. 1988). A party raising the defense of lis pendens may ask that the action in which the defense is being raised be abated, that it be stayed pending the outcome of the prior litigation, or that the two actions be consolidated. *See Virginia Mansions Condominium Association*, 552 A.2d at 277. The three-pronged identity test must be strictly applied when a party seeks to dismiss a claim under *lis pendens*. *Norristown Automobile Co., Inc. v. Hand*, 562 A.2d 902, 904 (Pa. Super. 1989). The

applicability of the doctrine of *lis pendens* is purely a question of law determinable from an inspection of the records in the two cases. *Procacina v. Susen*, 447 A.2d 1023, 1025 (Pa. Super. 1982). As to the application of the doctrine of *lis pendens*, an appellate court's scope of review is plenary. *See Lowenschuss v. Selnick*, 471 A.2d 529, 532 (Pa. Super. 1984) (holding that, where the complete records from two actions are available for review by an appellate court, the court can determine for itself whether *lis pendens* properly precipitates dismissal of the second action).

Here, Appellants' CHRIA claim in the present action is identical to the CHRIA claim in their prior federal action. The cases are the same in that Appellants allege Appellee violated the CHRIA by considering and denying employment to job applicants based on criminal conviction(s) that do not relate to the applicants' suitability for employment in each case. *See* Exhibits "A" and "B" to Appellee's Preliminary Objections. The parties in each action are the same in that Appellants are suing the same defendant, and have utilized a virtually identical class description in each of their Complaints. *Id.* Finally, the relief requested is the same in that Appellants have requested injunctive relief, actual and punitive statutory damages, and reasonable costs and attorneys' fees in both federal and state court. *Id.* Thus, even under a strict application of the *Hessenbruch* three-pronged identity test, the doctrine of *lis pendens* appears applicable.

Appellants argue that their CHRIA claim is no longer pending in federal court, thus defeating Appellee's assertion of a *lis pendens* defense. Appellants' argument rests on their assertion that, following the District Court's decision to decline supplemental jurisdiction over their CHRIA claim, there is no longer any basis for the District Court to hear that claim, regardless of whether Appellants succeed in their pending appeal before the Third Circuit.[1] In

[1] Under 28 U.S.C. §1367(a), in any civil action over which a District Court has original jurisdiction, the District Court shall also have "supplemental jurisdiction" over any other claims that are so related to claims in the action

support of this assertion, Appellants cite to *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3d Cir. 2000). In that case, the Third Circuit Court of Appeals held that a District Court's decision to decline supplemental jurisdiction over the plaintiff's state law claims under 28 U.S.C. §1367(c)(3) constituted a "final decision" for the purposes of determining appellate jurisdiction under 28 U.S.C. §1291, despite the fact that the state law claim was dismissed "without prejudice." *See id.* at 202. The Third Circuit Court in *Erie County Retirees Association* stated that the decision to decline supplemental jurisdiction over the plaintiff's state law claim effectively divested the District Court of the case entirely, precluding the plaintiff from reinstituting their state law claim anywhere but state court. *Id.*

However, should Appellants prove successful in their appeal of the federal court action, their CHRIA claim will be reinstated in the District Court along with their federal FCRA claim. The Federal Circuit Courts of Appeal have routinely held that, where a District Court declines to exercise supplemental jurisdiction over a litigant's state law claims under 28 U.S.C. §1367(c)(3), those state law claims will be reinstated in District Court upon reinstatement or remand of a litigant's dismissed federal claims, unless a separate basis to decline supplemental jurisdiction exists. *See R & J Holding Co. v. Redevelopment Authority of County of Montgomery*, 670 F.3d 420, 433 (3d. Cir. 2011) (vacating the portion of the District Court's order dismissing without prejudice Plaintiffs' pendent state law claims upon reinstatement of Plaintiffs' federal claims, noting that the standard for exercising discretion to dismiss state claims pendent on a viable federal claim differs from the standard governing dismissal when the federal claim itself lacks merit). *See also Rivera v. Rochester Genesee Regional Transportation Authority*, 743 F.3d 11, 27 (2d. Cir. 2014) (ruling that the District Court should retain supplemental jurisdiction over pendent state law claims where dismissal of related federal claims has been vacated and no other basis for declining supplemental jurisdiction exists under 28 U.S.C.

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within such original jurisdiction that they form part of the same case or controversy. District Courts may only decline to exercise supplemental jurisdiction in limited circumstances. *See* 28 U.S.C. §1367(c).

§1367(c)). The Third Circuit in *Erie County Retirees Association* also embraced this policy, holding that the state law claims over which the District Court declined to exercise jurisdiction should be reinstated in federal court following their remand of the federal claims. *See Erie County Retirees Association*, 220 F.3d at 217.

Here, Appellants have elected to appeal the dismissal of their federal FCRA claim by the District Court to the Third Circuit Court of Appeals. If Appellants are successful in their appeal, according to Third Circuit precedent, their state CHRIA claim will be reinstated in federal court, since there appears to be no separate basis under 28 U.S.C. §1367(c) for declining supplemental jurisdiction. As such, Appellants' State CHRIA claim is still technically "pending" in federal court, despite having been dismissed by the District Court without prejudice. If Appellants are not successful in their appeal, they may seek reinstatement of their Complaint in this court, as this court's Order of August 25, 2017 was issued, in effect, without prejudice. Therefore, because Appellants' CHRIA claim pending in federal court is identical to the CHRIA claim asserted in the present action, the doctrine of *lis pendens* applies, and this Court's dismissal (effectively, without prejudice), of the present action on these grounds should be affirmed.

As this court's determination of the *lis pendens* preliminary objections is dispositive of Appellant's action, at present, this court did not specify separate rulings on the remaining preliminary objections. However, in an abundance of caution, a discussion of the remaining preliminary objections follows.

B. Demurrer

A party may file preliminary objections to a pleading on the grounds of legal insufficiency in the nature of a demurrer. Pa.R.C.P. 1028(a)(4). A preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient. *Cooper v. Frankford Health Care System, Inc.*, 960 A.2d 134, 143 (Pa. Super. 2008). In determining

whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. *Id.* No testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208 (Pa. Super. 2012).

In considering preliminary objections in the nature of a demurrer, all material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Id.* However, a court need not accept as true conclusions of law, unwarranted inferences, allegations, or expressions of opinion. *Bayada Nurses, Inc. v. Commonwealth, Department of Labor and Industry*, 8 A.3d 866, 884 (Pa. 2010). Where it appears that the law will not permit recovery, the court may sustain preliminary objections in the nature of a demurrer. *Id.* Where a doubt exists as to whether a demurrer to the complaint should be sustained, the doubt should be resolved in favor of overruling the demurrer. *R.W. v. Manzek*, 888 A.2d 740, 749 (Pa. Super. 2005).

In its Preliminary Objections, Appellee asserts two separate grounds for a dismissal of Appellants' Complaint for legal insufficiency: (1) the doctrine of sovereign immunity; and (2) lack of adequate factual averments in the Complaint. Because the issue pertaining to the factual averments of the Complaint is one which is capable of being rectified by an amendment to the Complaint, and thus is not dispositive on the subject of dismissal, this court would sustain the preliminary objection and allow Appellants twenty (20) days to file an Amended Complaint, if appropriate.

1. Sovereign Immunity

The first basis for a demurrer asserted by Appellee is the doctrine of sovereign immunity. Under the doctrine, the Commonwealth, as well as its officials and employees acting within the

scope of their duties, are generally immune from suit, except where the General Assembly has specifically waived immunity. 1 Pa.C.S.A. §2310. "Unless sovereign immunity has been *specifically* waived, the legislature intends that it remain in effect." *Poliskiewicz v. East Stroudsburg University*, 536 A.2d 472, 475 (Pa. Cmwlth. 1988). Pennsylvania Courts have held that the defense of sovereign immunity may be raised by preliminary objection where it is apparent on the face of the pleadings. *See id.* at 473 n.1.

Several specific exceptions to sovereign immunity enacted by the General Assembly are codified in 42 Pa.C.S.A. §8522(b). *See* 42 Pa.C.S.A. §8522(a) ("The General Assembly ... does hereby waive, in the instances set forth in subsection (b) *only* ... sovereign immunity as a bar to an action against Commonwealth parties.") (emphasis added). *See also* 42 Pa.C.S.A. §8521(a) ("Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa.C.S. §2310."). Those exceptions include: (1) Vehicle liability; (2) Medical-professional liability; (3) Care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) Potholes and other dangerous conditions; (6) Care, custody or control of animals; (7) Liquor store sales; (8) National Guard activities; and (9) Toxoids and vaccines. *See* 42 Pa.C.S.A. §8522(b). Generally, no liability can be imposed against a Commonwealth party unless the claim falls within one of the above nine categories in which sovereign immunity has been waived. *Story v. Mechling*, 412 F.Supp.2d 509, 518 (W.D.Pa. 2006).

However, other statutory provisions have been found to constitute a specific waiver of sovereign immunity. *See SEPTA v. City of Philadelphia*, 159 A.3d 443, 454 (Pa. 2017) (noting that the Pennsylvania Human Relations Act contained a specific waiver of sovereign immunity where the terms "person" and "employer" were defined to include the Commonwealth and any political subdivision, authority, board and commission thereof). Courts apply a rule of strict construction in interpreting

any exceptions to sovereign immunity. *See Jones v. SEPTA*, 772 A.2d 435, 440 (Pa. 2001) (noting the legislature's intent in the Sovereign Immunity Act to shield the government from liability). Any statute in derogation of sovereignty should be construed strictly in favor of the sovereign. *Clipper Pipe & Service, Inc. v. Ohio Casualty Insurance Co.*, 115 A.3d 1278, 1282 (Pa. 2015). Statutory terms of general application should not be construed to encompass the Commonwealth absent some specific evidence of legislative intent to support that construction. *See id.* at 1282, n. 6.

Under Pennsylvania law, Appellee SEPTA is an agency of the Commonwealth of Pennsylvania. *See* 74 Pa.C.S.A. §1711(a) ("[SEPTA]... shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof."). *See also SEPTA v. City of Philadelphia*, 159 A.3d at 453 ("Respecting SEPTA, it is clear the MTAA provides that SEPTA exercises its public powers as an agency of the Commonwealth."). As such, Appellee is entitled to sovereign immunity. *See* 74 Pa.C.S.A. §1711(c)(3) ("It is hereby declared to be the intent of the General Assembly that [SEPTA], and [its] members, officers, officials and employees, shall continue to enjoy sovereign and official immunity, as provided in 1 Pa.C.S. §2310."). *See also SEPTA v. City of Philadelphia*, 159 A.3d at 453 ("It is equally undisputed that the MTAA extends sovereign Immunity to SEPTA."); *Lee v. SEPTA*, 418 F.Supp.2d 675, 681 (E.D.Pa. 2005); *Jones v. SEPTA*, 772 A.2d at 444 (Pa. 2001) (finding that SEPTA was immune from suit under 42 Pa.C.S.A. §8521 where no exceptions to sovereign immunity applied). Therefore, Appellee may only be held liable where the General Assembly has issued a specific waiver of the doctrine. *See* 74 Pa.C.S.A. §1711(c)(3) ("It is hereby declared to be the intent of the General Assembly that [SEPTA]... and [its] members, officers, officials and employees... shall remain immune from suit except as provided by and subject to the provision of 42 Pa.C.S. §§ 8501... through 8528."); *See also Story v. Mechling*, 412 F.Supp.2d at 518; *Battle v. Philadelphia Housing Authority*, 594 A.2d 769, 771 (Pa. Super. 1991).

Appellee's denial of employment to Appellants does not fall under any of the nine categories enumerated in 42 Pa.C.S.A. §8522(b) in which sovereign immunity has been specifically waived. However, Appellants argue that the CHRIA constitutes a specific statutory waiver of Appellee's sovereign immunity for the purposes of statutory enforcement. The majority of provisions within the CHRIA specifically govern the conduct of government agencies in relation to the collection management, use or dissemination of criminal history record information. *See Taha v. County of Bucks*, 862 F.3d 292, 306-07 (3d Cir. 2017) (citing Sections 9111, 9113-14, 9121, 9124, 9131, 9141 and 9171 of the CHRIA). However, Section 9125 of the CHRIA, under which Appellants have filed their claim, differs in that it more broadly regulates the conduct of "employers." 18 Pa.C.S.A. 9125. *See also Taha v. County of Bucks*, 862 F.3d at 306 n. 9 (characterizing Section 9125 of the CHRIA as an "exception" to the other provisions of the statute). The term "employer" is a term of general application, which may be interpreted to apply to private as well as government entities. The CHRIA does not supply any explanation or definition of the term "employer" which specifically includes the Commonwealth or its agencies. *See* 18 Pa.C.S.A. 9102. As such, based on the Pennsylvania Supreme Court's holdings in *Clipper* and *Jones*,[2] Section 9125 must be narrowly construed and interpreted in favor of preserving sovereign immunity, unless other evidence indicates a legislative intent to specifically waive it.

On its face, the CHRIA applies to "*any agency of the Commonwealth or its political subdivisions* which collects, maintains, disseminates or receives criminal history record information." 18 Pa.C.S.A. §9103 (emphasis added). Furthermore, the CHRIA provides that "[a]ny person, *including any agency or organization*, who violates the provisions of this chapter or any regulations or rules promulgated under it may ... [b]e subject to civil penalties or other remedies as provided for in this chapter." 18 Pa.C.S.A. §9181(2) (emphasis added). The CHRIA permits the

[2] *See* notes 45-46, *supra.* and accompanying text.

Attorney General or any other individual or agency to institute an action against "any person, agency or organization" to enjoin them from violating the provisions of the statute, or to compel compliance with those provisions. 18 Pa.C.S.A. §9183(a). The CHRIA also grants any person aggrieved by a violation of the provisions of the statute the substantive right to bring an action for damages by reason of such violation, allowing for recovery of actual and real damages of not less than one hundred dollars per violation, as well as reasonable costs and attorney fees. 18 Pa.C.S.A. 9183(b). The CHRIA also allows for the imposition of exemplary and punitive damages of not less than one thousand dollars, nor more than ten thousand dollars, for any violation found to be willful. 18 Pa.C.S.A. 9183(b)(2).

In light of the above provisions, it is clear that the General Assembly intended Section 9125 of the CHRIA to act as a specific, albeit limited, waiver of sovereign immunity. It is true that the undefined term "employer" in Section 9125, as a term of general applicability, would ordinarily prove insufficient on its own to constitute a specific waiver to sovereign immunity. However, the CHRIA's pronouncement of applicability to "any agency of the Commonwealth," as well as the creation of civil remedies against "any agency" found to be in violation of its provisions, evidences a clear intent on the part of the General Assembly to bring Commonwealth agencies into the purview of the statute. Thus, it appears that there is sufficient evidence to conclude that the CHRIA constitutes a specific waiver of sovereign immunity as it pertains to agencies of the Commonwealth, including Appellee SEPTA.

Appellee relies on the Commonwealth Court decision in *Poliskiewicz v. East Stroudsburg University* for their contention that claims brought under Section 9125 of the CHRIA are barred by sovereign immunity. *Poliskiewicz v. East Stroudsburg University*, 536 A.2d 472 (Pa. Cmwlth 1988). In *Poliskiewicz*, the Commonwealth Court affirmed dismissal of a complaint filed against a state

college defendant under Section 9125 of the CHRIA on the grounds of sovereign immunity. *See id.* at 475. However, the Court's application of the sovereign immunity doctrine in that case was largely premised on its characterization of the defendant as "the Commonwealth," rather than an agency thereof. *See id.* at 474-75 (indicating that state colleges were traditionally held to be "the Commonwealth" for purposes of immunity, and stating that the CHRIA did not contain any specific provision waiving immunity as to the Commonwealth). In fact, the Court in *Poliskiewicz* expressly acknowledged the CHRIA's applicability to agencies of the Commonwealth, which have traditionally been distinguished from the Commonwealth itself for the purposes of applying sovereign immunity. *See id.* at 475 (citing 18 Pa.C.S.A. §§9103, 9183). *See also Tork-Hiis v. Commonwealth*, 735 A.2d 1256, 1258-59 (Pa. 1999) (highlighting the distinction between the Commonwealth and its numerous subdivisions for the purposes of applying the doctrine of sovereign immunity); *Piehl v. City of Philadelphia*, 987 A.2d 146, 155 (Pa. 2009) (noting that the Pennsylvania Department of Transportation was a discrete Commonwealth agency that did not enjoy the same sovereign immunity as the Commonwealth). Therefore, the ruling in *Poliskiewicz* interpreting the doctrine of sovereign immunity as it applies to "the Commonwealth" is inapposite to this case where the Court is concerned with application of the doctrine to a "Commonwealth agency" such as SEPTA. Thus, in light of the CHRIA's clear evidence of legislative intent to waive the sovereign immunity of Commonwealth agencies, the doctrine of sovereign immunity does not apply in this case, and Appellee's preliminary objection on these grounds should be overruled.

2. Inadequate Factual Averments

The second basis for a demurrer asserted by Appellee is a lack of adequate factual averments to establish a claim under the CHRIA. Appellee argues that Appellants have failed to plead sufficient facts regarding the class members' criminal history, such as grading, length of incarceration (if any), aggravating factors (if any), or the circumstances of the convictions

themselves. As such, Appellee argues that Appellants' Complaint fails to state a claim under section 9125 of the CHRIA, since there are no facts to support Appellants' assertion that their convictions were unrelated to their suitability for employment.

As indicated above, the question presented in a demurrer is whether, on the facts averred, the law indicates with certainty that no recovery is possible. *See Bayada Nurses, Inc. v. Commonwealth, Department of Labor and Industry*, 8 A.3d 866, 871 n. 4 (Pa. Super. 2010). Where a defendant files a preliminary objection to the plaintiff's complaint in the nature of a demurrer, the court's review is confined to the content of the complaint; no factual matters or evidence outside of the complaint may be considered. *See In re Adoption of S.P.T.*, 783 A.2d 779, 782 (Pa. Super. 2001). All material facts set forth in the pleading, and all inferences reasonably deducible therefrom, must be admitted as true. *See Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208 (Pa. Super. 2012). However, a court need not accept as true conclusions of law, unwarranted inferences, allegations, or expressions of opinion. *See Bayada Nurses, Inc.*, 8 A.3d at 884. Where a doubt exists as to whether a demurrer to the complaint should be sustained, the doubt should be resolved in favor of overruling the demurrer. *R.W. v. Manzek*, 888 A.2d 740, 749 (Pa. Super. 2005).

In their Complaint, Appellants plead factual allegations regarding the experiences of three representative class members: Frank Long, Joseph Shipley and Michael White. *See* Complaint, ¶¶33-63. In their statement of facts, Appellants aver that each representative class member applied to work for Appellee, and that Appellee denied each of their applications based on their criminal history. *Id.* Appellants also aver that the criminal history on which these denials were based was not relevant to the representative class members' suitability for employment, for reasons including the nature of the crime, the age of the conviction, the class

members' employment history, and the years that each class member had been in the general population without any further convictions. *See* Compaint, ¶¶41, 54, 63.

However, Appellants have failed to allege any facts which tend to support their conclusory allegation that the representative class members' criminal history was unrelated to their suitability for employment. The most detailed account is that of Mr. Long, who Appellants aver "had 1997 drug convictions for possession and manufacture of a controlled substance originating from a single 1994 arrest." *See* Complaint, ¶41. In their accounts of Mr. Shipley's and Mr. White's experiences, Appellants merely averred that the representative class members were convicted of "drug-related offenses," providing the years in which the convictions occurred. *See* Complaint, ¶¶53,62. Appellants have not pled any information which would tend to demonstrate that such the above-outlined criminal history was unrelated to the applicants' suitability for employment, such as the circumstances of the arrests, the nature of the crimes or the presence or absence of any aggravating or mitigating factors. As such, Appellee's preliminary objection grounded in inadequate factual averments should be sustained this court would allow Appellants twenty (20) days to file an Amended Complaint.

3. Lack of Commonality

The third basis for a demurrer asserted by Appellee in its preliminary objections is a lack of commonality amongst Appellant class members' claims. However, as Appellants correctly point out, "Issues of fact with respect to the Class Action Allegations may not be raised by preliminary objections but shall be raised by the answer." *See* Pa.R.Civ.P. 1705. Therefore, because Appellee is barred from raising issues of fact regarding the subject of commonality, Appellee's preliminary objection on these grounds should be overruled.

4. Improper Exemplary & Punitive Damages

The fourth basis for a demurrer asserted by Appellee is that exemplary and punitive damages are not recoverable against SEPTA, and should be stricken from the Complaint. Appellee first contends that SEPTA, as a Commonwealth Agency, is immune from the imposition of punitive damages. Appellee also contends that, even assuming the doctrine of immunity does not apply, punitive damages may not be assessed because Appellants have failed to sufficiently plead willfulness in their Complaint.

The Pennsylvania Supreme Court has held that the Commonwealth and its agencies generally enjoy immunity from punitive damages under Pennsylvania common law. *See Feingold v. SEPTA*, 517 A.2d 1270, 1277 (Pa. 1986) (concluding that punitive damages were not recoverable against SEPTA given its status as a Commonwealth agency). The court in *Feingold* based its ruling in large part on U.S. Supreme Court precedent, which held that considerations of history and public policy did not support the imposition of punitive damages on a state or its agencies. *See Feingold v. SEPTA*, 517 A.2d at 1276-77 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)).[3] However, punitive damages may be assessed against a state or municipal agent where they are expressly authorized by statute. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 260 n. 21.[4]

The Third Circuit Court of Appeals recently held that the CHRIA contains an express authorization for the imposition of punitive damages on Commonwealth agencies. *See Taha v. County of Bucks*, 862 F.3d 292, 308 (3d. Cir. 2017). The Third Circuit Court first noted that the CHRIA,

[3] The U.S. Supreme Court in *City of Newport* noted that the immunity of a state or municipality from punitive damages at common law was virtually unanimous among several states. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 259-61. The Court noted that the imposition of punitive damages against a state or municipal actor was generally viewed to be against sound public policy, since such awards would not adequately serve the purposes of retribution or deterrence. *Id.* at 267-69. Rather, the Court held that such awards would only serve to punish and burden innocent taxpayers and citizens, who took no part in the alleged wrongdoing. *Id.* at 263-67.

[4] Part of the Supreme Court's analysis in *City of Newport* involved an examination of legislative intent in order to discern whether Congress had waived municipal immunity from punitive damages, thus affirming that such immunity is capable of being waived by statute. *Id.* at 263-66.

on its face, applies to Commonwealth agencies and political subdivisions. *See id.* at 306 (citing 18 Pa.C.S.A. §9103). The Court then went on to highlight the express language of the CHRIA which states that "[a]ny person, *including any agency or organization*, who violates the provisions of this chapter or any regulations or rules promulgated under it may … [b]e subject to civil penalties or other remedies as provided for in this chapter," which include both actual and real damages as well as punitive damages. *See id.* at 307 (citing 18 Pa.C.S.A. §§9181, 9183). In issuing its ruling, the Third Circuit Court in *Taha* acknowledged the prior holdings in *Feingold* and *City of Newport*, citing the latter for support of the proposition that state immunity from punitive damages could be expressly authorized by statute. *See id.* at 306. The Third Circuit Court also distinguished its ruling from prior Pennsylvania Supreme Court precedent upholding the doctrine of immunity where the plaintiff brought claims under common law. *See id.* at 307 n. 11 (citing *Hunt v. Pennsylvania State Police of Commonwealth*, 983 A.2d 627 (Pa. 2009)).

Here, Appellants bring a claim under the CHRIA against Appellee for a violation of Section 9125. Appellee, as a Commonwealth Agency, would normally be immune from the imposition of punitive damages under *Feingold*. However, as indicated by the U.S. Supreme Court in *City of Newport*, such immunity may be waived by express statutory authorization. Furthermore, according to the Third Circuit's holding in *Taha*, the CHRIA contains an express statutory waiver of immunity from punitive damages for any agency of the Commonwealth found to have willfully violated its provisions. As such, Appellee cannot claim immunity from punitive damages based on its status as a Commonwealth agency. Rather, the question of whether or not punitive damages may be imposed turns on whether or not Appellants succeeded in pleading the willfulness of Appellee's actions.

In order to plead a willful statutory violation, a plaintiff must generally aver facts which tend to show that the defendant either knew or showed reckless disregard as to whether its

conduct was prohibited by statute. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Here, Appellants aver in their Complaint that Appellee violated the CHRIA by applying a company policy of disqualifying applicants with drug-related criminal history for certain positions within their company. *See* Complaint ¶¶66, 88. Appellants also aver that Appellee knew or should have known of its obligations under the CHRIA to avoid using criminal history information in hiring decisions which does not pertain to the applicant's suitability for employment. *See* Complaint ¶67. However, Appellants do not aver any facts which demonstrate that Appellee knew its policy violated the CHRIA, or that it implemented its policy with reckless disregard for their statutory duty. As such, Appellants have failed to plead willfulness in their Complaint, and Appellee's Preliminary Objection on these grounds should be sustained and Appellants allowed twenty (20) days to file an Amended Complaint.

C. Insufficient Specificity in a Pleading

A party may file a preliminary objection to a pleading on the basis of insufficient specificity. Pa.R.Civ.P. 1028(a)(3). "The pertinent question under Rule 1028(a)(3) is whether the complaint is sufficiently clear to enable the defendant to prepare a defense, or whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." *See Podolak v. Tobyhanna Township Board of Supervisors*, 37 A.3d 1283, 1288 (Pa. Super. 2012) (citing *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa. Super. 2006)).

Here, Appellants' Complaint is pled with sufficient specificity to enable Appellee to prepare their defense. Appellants assert only one theory of liability in their complaint, alleging that Appellee violated Section 9125 of the CHRIA by improperly considering prior drug-related convictions of several job applicants which were irrelevant to their suitability for employment. *See* Complaint ¶¶84-91. Appellants assert that Appellee committed this violation by applying a

broad disqualification policy without making an individual suitability assessment for each individual employee. *See* Complaint ¶88.

Appellee cites to numerous cases in their Preliminary Objections which state that a complaint must provide a synopsis of the essential facts to support the claim asserted. However, these cases all deal with the standard for determining the legal sufficiency of a Complaint under Rule 1028(a)(4), or the general pleading standard set forth under Rule 1019(a), *not* for determining whether a complaint is sufficiently specific under Rule 1028(a)(3). In this case, Appellee has ample notice of the basis on which Appellants seek recovery, and should have no difficulty in ascertaining the grounds upon which to make a defense. As such, Appellants' Complaint is sufficiently specific, and Appellee's preliminary objections on these grounds should be overruled.

D. Failure to Conform to Rule of Law

A party may assert a preliminary objection to a pleading on the grounds that it fails to conform to a law or rule of court. Pa.R.Civ.P. 1028(a)(2). Under the Pennsylvania Rules of Civil Procedure, when any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof to its pleading. Pa.R.Civ.P. 1019(i). If the writing or a copy thereof is not accessible to the pleader, it is sufficient so to state together with the reason, and to set forth the substance of the writing. *Id.*

Here, Appellants' claim under the CHRIA is based upon SEPTA policy #E20, a written hiring policy enacted by Appellee. *See* Complaint ¶66. Appellants have failed to attach a copy of SEPTA policy #E20 to their Complaint in accordance with Rule 1019(i). Nor have Appellants indicated that SEPTA policy #E20 is inaccessible to them, or set forth the substance of the policy in their complaint. Thus, Appellants' complaint fails to comply with the Pennsylvania Rules of

Civil Procedure, and Appellee's preliminary objection on these grounds should be sustained and this court would allow Appellants twenty (20) days to submit an attachment to their Complaint containing the aforementioned policies.

E. Scandalous and Impertinent Matter

A party may assert a preliminary objection to a pleading on the basis that it includes scandalous or impertinent matter. Pa.R.Civ.P. 1028(a)(2). For an allegation within a complaint to be considered "scandalous" or "impertinent," and thus subject to being stricken, it must be deemed immaterial and inappropriate to the proof of the cause of action. *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998). Appellee asserts that paragraphs five through eleven of Appellants' Complaint should be stricken as scandalous or impertinent, arguing that these allegations are unrelated to the proof of Appellants' cause of action.

In reviewing paragraphs five (5) through eleven (11) of the Complaint, it is apparent that paragraphs seven (7) through nine (9) cannot be deemed "scandalous" or "impertinent," as they bear directly on Appellants' stated cause of action. *See* Complaint ¶¶7-9. Furthermore, while paragraphs five (5) and six (6) are not directly related to Appellants' CHRIA claim, neither are they wholly immaterial or inappropriate, since they bear on general rights and policies which are related to the issues raised in Appellants' claim. *See* Complaint ¶¶5-6. However, paragraphs ten (10) and eleven (11) do appear to contain immaterial and inappropriate matter.

Paragraph ten of the Complaint contains the general assertion that Appellee's alleged violation of the CHRIA constitutes an "unwarranted stigmatization and unreasonable restriction on the economic opportunities of vulnerable populations." *See* Complaint ¶10. Such conclusory and general statements of opinion are more appropriately reserved for closing argument, and

have no place in a pleading. Likewise, paragraph eleven is inappropriate in that it suggests that Appellee's actions create a type of disparate impact on the basis of race, ethnicity, color and national origin, while simultaneously admitting that such disparate impact is not related to the proof of Appellants' cause of action. *See* Complaint ¶11. As such, Appellee's preliminary objection on these grounds should be sustained and paragraphs ten and eleven of Appellants' complaint should be stricken as immaterial and impertinent.

For the reasons stated above, this court's decision should be affirmed.

BY THE COURT:

J.